IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-0800547 C-0800548
Plaintiff-Appellee,	:	TRIAL NOS. B-0704280 B-0706221-A
vs.	:	
BYRON HARRINGTON,	:	*D E C I S I O N.*
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 23, 2009

Joseph T. Deters, Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Herbert J. Haas, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

WILLIAM L. MALLORY JR., Judge.

{¶1} Defendant-appellant Byron D. Harrington ("Harrington") appeals his 12-count conviction of various charges including breaking and entering, receiving stolen property, and safecracking. For the more fully detailed reasons to follow, the trial court's judgment is affirmed.

I. Statement of Facts

{¶2} Harrington was indicted for 13 counts under two case numbers, including eight counts of breaking and entering, two counts of receiving stolen property, and three counts of safecracking. For trial purposes, the two case numbers were consolidated, and a jury trial was scheduled for May 2008 in the Hamilton County Court of Common Pleas.

{¶3} Prior to trial, Harrington filed a motion to suppress evidence discovered after a police search of a motel room. The basis of Harrington's motion was twofold: (1) underlying affidavits supporting the search warrants contained false statements; and (2) the affidavits were insufficient to establish probable cause. Harrington then sought to have the court conduct a *Franks*[1] hearing on the search warrants' allegedly false statements. The court denied the request for a *Franks* hearing and overruled the motion to suppress.

{¶4} The case proceeded to trial, eventually reaching the jury-deliberation stage. During deliberation, the jury had the following questions for the court: "If there were three people on a team, two people went inside and one remained in the car and did not enter, can he still be charged with breaking and entering (the one remaining in

[1] *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674.

the car)? * * * Even though one may be part of a group with purpose of breaking and entering but perhaps did not enter the building, can one still be charged with breaking and entering?" The court answered these questions affirmatively and, over the objection of Harrington, instructed the jury sua sponte on complicity pursuant to R.C. 2923.03.

{¶5} The jury ultimately found Harrington guilty of 12 of the 13 counts (the jury acquitted Harrington of one count of breaking and entering), and the court sentenced him to 14 years of incarceration. In this appeal, Harrington now brings forth five assignments of error.

II. Denial of Franks *Hearing and Search of Motel Room*

{¶6} In his first assignment of error, Harrington claims that the court erred when it overruled his motion to suppress and refused his request for a *Franks* hearing. In addition, Harrington's third assignment of error claims that the entire search and seizure process at his motel room, which produced the incriminating evidence used against him at trial, was illegal, thus violating his Fourth Amendment right against unreasonable searches and seizures.

{¶7} "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."[2] This hearing is commonly known as a "*Franks* hearing." Harrington argues that the affidavits used to obtain the search warrants were materially and intentionally false. The basis of his argument is that the affidavits contained erroneous information regarding his

[2] *Franks*, supra, at 155-156, 98 S.Ct. 2674.

criminal record, and that the affiants either intentionally or recklessly falsified this information. Specifically, Harrington points to the fact that the affidavits mentioned prior charges for breaking and entering, and burglary. Subsequent examination of his record revealed that Harrington had never been indicted on any breaking-and-entering charge. He had been previously charged with one count of aggravated burglary, which was later dismissed. Harrington argues that this was enough of a "substantial preliminary showing" to entitle him to the *Franks* hearing denied by the trial court.

{¶8} We disagree. As argued by the state, a search warrant's supporting affidavit has a presumption of validity.[3] To overcome this presumption, a defendant must show, by a preponderance of the evidence, that the affiant intentionally made a false statement or made a false statement with a reckless disregard for the truth.[4] Additionally, even if a warrant is supported by an affidavit containing intentionally false statements or statements made recklessly, it will still be considered valid if, with the false statements set aside, the affidavit's remaining content is sufficient to establish probable cause.[5]

{¶9} Harrington failed to meet his burden to show by a preponderance of the evidence that the police officer's affidavits were intentionally or recklessly false. We agree that the affidavits contained false statements: prior to this case, Harrington had never been indicted on any breaking-and-entering charge, and the one time he had been indicted for aggravated burglary, the charge was eventually dismissed. However, Harrington offered no evidence other than self-serving

[3] *State v. Roberts* (1980), 62 Ohio St.2d 170, 178, 405 N.E.2d 247.
[4] *Franks*, supra, at 155-156; *State v. Waddy* (1992), 63 Ohio St.3d 424, 441, 588 N.E.2d 819.
[5] *Waddy*, 63 Ohio St.3d at 441, 588 N.E.2d 819.

allegations that the false statements were made intentionally or recklessly. Further, the record reflects that Harrington testified under oath, in support of his motion, that he believed that he had previously been charged with breaking and entering.

{¶10} We are also convinced that, with the false statements contained in the affidavits set aside, the other facts supported the trial court's finding of probable cause. The affidavits contained truthful statements about Harrington's extensive criminal history including theft offenses, drug offenses, and offenses of general dishonesty, thus establishing the probable cause necessary to issue the warrants. Therefore, because probable cause was established, the search warrants were valid, and the evidence gathered as a result of the warrants was properly admitted. Under these circumstances, we conclude that the trial court did not err by refusing Harrington's request for a *Franks* hearing. In addition, because the search warrants were valid, we cannot say that the trial court erred in overruling Harrington's motion to suppress. Harrington's first and third assignments of error are overruled.

III. Complicity Instruction and the Timing of It

{¶11} Harrington's second assignment of error concerns the trial court's jury instruction regarding complicity. Harrington claims that it was error for the court to sua sponte instruct the jury on complicity, during the jury-deliberation stage, after answering a jury question. Harrington also claims that it was inherently unfair to instruct the jury on complicity because the entire trial had proceeded on the theory that Harrington was the principal offender, not an aider and abettor.

{¶12} R.C. 2923.03(A)(2) states that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." In addition, R.C. 2923(F) states, "Whoever violates this section is guilty of complicity in the commission of an offense, and shall be

prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense." In other words, if the evidence permits, a defendant is on notice that he or she may be found guilty either as the principal offender or as a complicitor pursuant to R.C. 2923.03(F). Many Ohio cases have held that defendants may be found guilty under the language of R.C. 2923.03 even though they have been indicted and prosecuted as principal offenders.[6]

{¶13} Harrington relies upon one of our prior cases, *State v. Killings*,[7] to further his argument that the trial court should not have instructed on complicity. In *Killings*, the defendant, along with a co-defendant, was indicted on one count of kidnapping and one count of rape in the abduction and sexual assault of a female. During trial, testimony was presented that the victim had been raped twice, once by Killings and once by the co-defendant. At the conclusion of the trial, the jury was instructed on complicity and eventually returned a verdict of guilty on the rape charge and not guilty on the kidnapping charge. The defendant appealed the rape conviction, and we reversed, holding that it was improper to instruct the jury on complicity because the defendant had been indicted only as the principal offender for the rape. Specifically, we stated, "[F]undamental decency and civilized conduct require that an accused be permitted to defend himself fairly against crimes charged to him, and to do so, it is necessary that he be fully and fairly informed of the nature and cause of the accusations against him. The fundament of such information is provided by the indictment."[8]

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[6] See *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 697, 664 N.E.2d 1318; *State v. Ensman* (1991), 77 Ohio App.3d 701, 703, 603 N.E.2d 303; *State v. Dotson* (1987), 35 Ohio App.3d 135, 138, 520 N.E.2d 240.
[7] *State v. Killings* (May 29, 1998), 1st Dist. Nos. C-970167 and C-970247.
[8] Id., quoting *State v. Crooks* (Dec. 12, 1984), 1st Dist. No. C-840184.

{¶14} The facts in Harrington's case and the facts in *Killings* can be distinguished. The defendant in *Killings* was charged with one count of rape and was prosecuted as a principal offender. A complicity instruction pursuant to R.C. 2923.03(F) was improper because the defendant was not charged for the second rape; in other words, it was impossible for R.C. 2923.03(F) to put him on notice as to the possibility of being an accomplice because he was not indicted on anything relating to the second rape.

{¶15} Unlike the defendant in *Killings*, Harrington was indicted as a principal joint offender, along with two other co-defendants, with respect to all the charges. Therefore, R.C. 2923.03(F) put Harrington on notice that he could be tried as either the principal offender or as a complicitor on any or all of the charges.

{¶16} Turning now to the timing of the trial court's sua sponte complicity instruction (during jury deliberation, after a jury question), Harrington cites *State v. Lamarr*[9] in support of his argument that the trial court erred in instructing the jury on complicity. *Lamarr* has facts similar to this case. The prosecution sought a complicity instruction on a drug-possession charge prior to closing arguments. The court denied the motion, indicating that no mention of aiding and abetting had been made during the trial. The parties proceeded with closing arguments, and during the prosecution's summation, the state, for the first time, argued that the defendant was guilty of complicity for aiding and abetting a co-defendant on the possession charge.

{¶17} At the end of closing arguments, the court did not instruct the jury on complicity. During deliberation, the jury specifically asked the court about

[9] 2005-Ohio-6030.

complicity. This jury question prompted the court, over the defendant's objection, to reconsider its earlier decision and to instruct the jury on complicity.

{¶18} In a two-to-one decision, the Third Appellate District upheld the conviction, concluding that there was sufficient evidence produced during the trial to establish complicity, thus allowing the trial court to instruct on complicity under R.C. 2923.03(F).[10] The lead and concurring opinions also determined that any error that the trial court had committed in coming to a decision to instruct on complicity was procedural in nature, not substantive, and therefore harmless.[11] The dissenting opinion disagreed, reasoning that the defendant did not have an opportunity to rebut the complicity argument first raised in the prosecution's summation. Under these circumstances, the complicity instruction was "inherently unfair and [went] beyond the limits of propriety."[12]

{¶19} Harrington relies on the dissenting opinion in *Lamarr*, arguing that the timing of the complicity instruction in this case was "inherently unfair." But we distinguish *Lamarr* from this case. In *Lamarr*, the defendant never had the chance to address the complicity argument made by the state in its summation. In this case, neither the state nor the defense addressed the issue of complicity during closing arguments, so there was nothing for Harrington to rebut. The first time the issue of complicity was addressed was after the jury's question to the trial court. We hold that it was not error for the trial court to instruct the jury on complicity in response to the jury's question.

[10] Id. at ¶12.
[11] Id. at ¶18 and ¶26 (Rogers, J., concurring).
[12] Id. at ¶27 (Bryant, J., dissenting).

{¶20} Harrington also cites *State v. Woods*[13] in support of his argument that the evidence submitted at trial was not sufficient to find him guilty of aiding and abetting, and, therefore, that a complicity instruction was improper. In *Woods*, the defendant was acquitted under Crim.R. 29 on an indicted charge of conspiracy. However, the trial court had instructed the jury on the offense of complicity when it determined that there was sufficient evidence that the defendant either was the principal offender or was present when the offenses of aggravated murder and aggravated robbery had been committed. In reversing the defendant's convictions, we held, among other things, that the evidence adduced at trial permitted the defendant to be found guilty only as a principal offender. Therefore, the complicity instruction was improper.

{¶21} Unlike *Woods*, we hold that there was sufficient evidence presented in this case to allow a jury instruction on complicity under R.C. 2923.03(F). For example, a police officer identified Harrington's voice as that of the person who had called the alarm company during a break-in; a coat the defendant was wearing at the time of a break-in and in the same vicinity was found in his motel room; stolen items from multiple break-ins were found in Harrington's motel room and car; Harrington's DNA was found on a cigar at a crime scene; and Harrington's DNA was found on tools recovered from a stolen van. Harrington's second assignment of error is overruled.

IV. Harrington Not Present in Courtroom

{¶22} In his fourth assignment of error, Harrington argues that the trial court erred when it proceeded at a "crucial stage" of the trial without him being present. A review of the record indicates that Harrington was not present in the

[13] (1988) 48 Ohio App.3d 1, 548 N.E.2d 954.

courtroom during the jury-deliberation stage when the court addressed the jury's question regarding complicity.

{¶23} Crim.R. 43(A) states, "[T]he defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of verdict, and the imposition of sentence[.] * * * In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict."[14]

{¶24} The record shows that Harrington had voluntarily disrobed and refused to come to the courtroom. Harrington's attorney was aware of Harrington's actions, did not object to his absence, and waived his presence. Under these circumstances, we conclude that Harrington's absence was voluntary and accordingly overrule his fourth assignment of error.

V. Harrington Received a Fair Trial

{¶25} In his final assignment of error, Harrington claims that the "cumulative errors" made throughout his trial created a "tainted environment" that prevented him from receiving a fair trial. Essentially, this fifth assignment of error is nothing more than a summation of the previous four. Because we have found no reversible error in his previous four assignments of error, we likewise overrule Harrington's fifth assignment of error.

VI. Conclusion

{¶26} We find no merit in any of Harrington's five assignments of error. The judgment of the trial court is affirmed.

Judgment affirmed.

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[14] See, also, *State v. Meade*, 80 Ohio St.3d 419, 421 1997-Ohio-332, 687 N.E.2d 278.

HENDON, P.J., and **DINKELACKER, J.,** concur.

Please Note:

The court has recorded its own entry this date.